

Message

From: Jackson, Mary [/O=EXCHANGELABS/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=7B4AB98640E443848AF6EF0A7D891392-JACKSON, MARY]
Sent: 4/3/2019 5:59:39 PM
To: Karimjee, Anhar [anhar.karimjee@hq.doe.gov]
Subject: FW: Initial Summary of DC Circuit Opinion in Utility Solid Waste Activities, et al v. EPA (CCR Rule)
Attachments: ENV_DEFENSE-#850820-v1-USWAG_v__EPA_Opinion.pdf

Anhar,
Let me know if this is what you were looking for...
Thanks,
Mary

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Environmental Protection Agency
Office of Resource Conservation & Recovery
Materials Recovery & Waste Management Division
Phone (703) 308-8453

From: Celeste, Laurel
Sent: Thursday, August 30, 2018 3:30 PM
To: Jackson, Mary <Jackson.Mary@epa.gov>
Subject: FW: Initial Summary of DC Circuit Opinion in Utility Solid Waste Activities, et al v. EPA (CCR Rule)

You can forward this to susan

From: Michaud, John
Sent: Tuesday, August 21, 2018 5:49 PM
To: OGC Immediate Office MGMT <OGC_Immediate_Office_MGMT@epa.gov>
Cc: OGC Immediate Office Support <OGCFrontOfficeSupportStaff@epa.gov>; Lewis, Jen <Lewis.Jen@epa.gov>; Celeste, Laurel <celeste.laurel@epa.gov>
Subject: Initial Summary of DC Circuit Opinion in Utility Solid Waste Activities, et al v. EPA (CCR Rule)

All --
Attached is the decision issued this morning by the DC Circuit in Utility Solid Waste Activities, et al v. EPA, which reviewed the 2015 coal ash disposal rule. The Court ruled for the environmental petitioners on three claims, but ruled for EPA on all remaining claims, upholding most of the rule.

SWERLO will provide a more detailed assessment tomorrow but here is a very brief summary of the opinion.

The court denied our motion to hold the case in abeyance.

The court granted our request for remand of the two beneficial use provisions on the ground that the agency is reconsidering the provisions. These are the provisions that 1) establish different requirements for "piles" of CCR located on-site of a utility and those that are located off-site but destined for beneficial use and 2) the 12,400 ton threshold in the beneficial use definition. The court also granted our request to remand back the provision that did not allow a facility to establish their own risk-based alternative groundwater protection standard (in lieu of background), relying on the final remand rule to hold that the challenge was now moot.

The court upheld EPA's authority to regulate inactive impoundments under subtitle D. The majority based their decision on Chevron step 1, holding that "RCRA is explicit that inactive sites may qualify as open dumps if they are facilities where waste "is disposed of," regardless of whether they are also facilities where more "disposal" continues to occur." The concurring opinion upholds EPA's authority to regulate as a reasonable interpretation of RCRA under Chevron step 2.

However the court held that EPA acted "arbitrarily and capriciously and contrary to RCRA" in failing to require the closure of unlined surface impoundments; in classifying so-called "clay-lined" impoundments as lined, and in exempting inactive surface impoundments at inactive power plants from regulation. The decision focuses primarily on the lack of a record to demonstrate that these provisions will meet the RCRA 4004(a) protectiveness standard (i.e. "no reasonable probability of adverse effects on health or the environment.") Thus, the court vacated and remanded the three provisions of the final rule that permit unlined impoundments to continue receiving coal ash unless they leak, [§ 257.101(a)], classify "clay-lined" impoundments as lined, [§ 257.71(a)(1)(i)], and exempt from regulation inactive impoundments at inactive facilities. [257.50(e)].

In rejecting the industry challenge to the provision that precluded qualifying for the alternative closure requirements based on costs and inconvenience, the court held that "[u]nder any reasonable reading of RCRA, there is no textual commitment of authority to the EPA to consider costs in the open-dump standards. RCRA's statutory language instructs the EPA to classify a disposal site as a sanitary landfill and not an open dump only "'if there is no reasonable probability of **adverse effects on health or the environment** from disposal of solid waste at such facility.'" 42 U.S.C. § 6944(a) (emphasis added)." The court noted that in light of *Michigan v. EPA* and *American Trucking* "it is far from clear that the EPA could consider costs even if it wanted to" and concluded that "there is no statutory support for the assertion that EPA was **required** to consider costs in developing its alternative closure plan." Opinion at 61(emphasis in original).

The court also rejected the industry challenges to the aquifer location criteria and the seismic location criteria.

Finally, the court rejected the environmental petitioners' claims regarding the internet posting requirements because they had failed to raise their claims in comments.

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